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IN THE

Supreme Court of the United States

October Term, 1953

No. 674 24

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Executor,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Executor,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Louis Sternberger died on June 25, 1947. He was survived by his wife, age 62, and an unmarried daughter, age 27, who had no descendants (R. 4-6). His Will provided that his residuary estate be held in trust during the lives of his wife and daughter, and that upon the death of the survivor one-half be paid to the daughter's descendants then living, and if there be none, to certain named charitable organizations (R. 5). An *inter vivos* trust, taxable in the decedent's estate, contained similar provisions (R. 5). The other half of the residuary estate is not involved in this proceeding.

The Tax Court, in accordance with the provisions of Section 812 (d) of the Internal Revenue Code, determined that the amount of the charitable bequest was deductible from the value of the gross estate. The amount of the bequest was found as a fact by the court. The Court of Appeals for the Second Circuit (Judges Learned Hand, Augustus N. Hand and Thomas W. Swan) unanimously affirmed this decision in a one sentence *per curiam* opinion.

When the decedent's wife and daughter die, the property here involved will all go to charity unless the daughter, who was unmarried, should have issue and the issue survive both her and her mother. It is petitioner's contention that, because the remainder is contingent, no deduction whatever should be allowed for this very substantial charitable bequest.

Reasons Why the Petition for Writ of Certiorari Should Be Denied.

Summary.

I

There is no conflict between the First and Second Circuits.

II

The decision below is in accord with this Court's decision in *Humes* v. *U. S.*

III

The decision below is in accord with the other cases cited by petitioner.

I.

There is no conflict between the First and Second Circuits.

Petitioner asserts (p. 7) that the decision below "is squarely in conflict with the decision of the First Circuit in *Newton Trust Company* v. *Commissioner*, 160 F. 2d 175". He makes this assertion despite the fact that neither the Second Circuit nor the Tax Court deemed it necessary to distinguish *Newton Trust* in their opinions.

In *Newton Trust*, deduction of a charitable remainder was disallowed because it was impossible to value it at the date of decedent's death. This was so because during the intervening life estate the trustee had a broad power to invade the trust corpus and thereby divert it to non-charitable use by reason of a provision in the will which authorized the trustee "to make such payment or payments to or for the use and benefit of my said wife as it may in its sole discretion deem advisable" (p. 177). In the case at bar, the trust corpus was not subject to a power of invasion, and the value of the charitable remainder was ascertainable on the date of death. Indeed, that value was found as fact by the trial court (R. 8).

The First Circuit's decision in *Newton Trust* is in line with the Second Circuit's decisions in cases where the charitable interest could not be valued at the time of death. See for example *Burdick* v. *Commissioner*, 117 F. 2d 972 and *Davison* v. *Commissioner*, 81 F. 2d 16. In cases where the charitable interest can be valued both circuits allow the deduction. The First Circuit's recent decision in *Blodget* v. *Delaney*, 201 F. 2d 589, clearly illustrates this. In that case the decedent left the residue of his estate in trust with income payable to his sister for life and upon

her death, three quarters of the remainder to charities. The Will contained a provision authorizing the trustees to invade principal for the sister's comfort and welfare. The First Circuit found that the will contained a standard whereby the maximum extent of invasion could be measured and held that the charitable remainder was therefore capable of valuation and deductible. The court distinguished its previous decision in *Newton Trust* as a case where the charitable interest could not be valued because of the measureless character of the power of invasion.

Both the *Blodget* and *Newton Trust* cases involve powers of invasion. Even in this type of situation the value of the charitable remainder can be determined and deduction allowed if the standards governing invasion are "fixed in fact and capable of being stated in definite terms of money". *Ithaca Trust Company* v. *U. S.*, 279 U. S. 151 at p. 154. In cases like the one at bar which do not involve a power of invasion, valuation can much more readily be determined. Thus in *Gardiner* v. *Hassett*, 63 F. Supp. 853, the U. S. District Court for the District of Massachusetts ruled that a charitable remainder was deductible even though the charity would receive nothing unless the testator's brother survived both her niece and the niece's husband. The contingency there involved was of the same type as the one involved in the case at bar, and the Massachusetts District Court determined that the charitable remainder could be valued actuarially, citing the Second Circuit's decision in *Meierhof* v. *Higgins*, 129 F. 2d 1002.

The First Circuit's decision in *Newton Trust* is not inconsistent with the decision below. Both are affirmances of Tax Court decisions. In spite of its previous decision in favor of the Commissioner in *Newton Trust*, the Tax Court had no difficulty in deciding in favor of the taxpayer in the case at bar. The Tax Court saw no inconsistency between the two cases and there was none.

II.

The decision below is in accord with this Court's decision in Humes v. U. S.

In *Humes* v. *U. S.*, 276 U. S. 487, this Court denied deduction of a charitable bequest payable only if an intervening life beneficiary died without issue before attaining the age of 40. The deduction was denied because the taxpayer had not presented any proof on the basis of which the trial court could value the charitable interest. As stated by this court at page 492:

> "The Court of Claims did not find that the present value of the contingent bequests to the charities can be determined by the calculations of actuaries based upon experience tables."

In an effort to overcome this defect the taxpayer asked this Court to take judicial notice of antiquated tables dealing with 4400 lives of female members and 1522 lives of male members of the Scotch peerage and apply them to a fifteen year old Texas girl, which of course this Court refused to do.

The facts of the *Humes* case and the findings of the trial court therein contrast sharply with the facts and the findings of the trial court in this case. In the case at bar the value of the charitable remainder was found as fact by the Tax Court. This valuation was prepared by a recognized firm of actuaries in accordance with established actuarial principles based upon known and reliable data (R. 6). The computation was reviewed and approved by an independent actuarial expert (R. 36-47; 59-60). As stated by the Tax Court:

> "Petitioner presented reliable and conservative actuarial testimony to estimate the value of the contingent remainder to charity at the date of decedent's death to support his deduction of $179,154.19. We do not feel that we are at liberty to disregard this testimony of competent actuaries who have made their computations in accordance with what appear to be well recognized actuarial methods" (R. 10).

The deduction was denied in *Humes* solely because of the lack of adequate proof on which valuation of the charitable interest could be based. If, as the petitioner contends, deduction was denied in *Humes* because the charitable remainder was contingent, it is submitted that this Court would have said so and disposed of the case on that ground.

III.

The decision below is in accord with the other cases cited by petitioner.

Petitioner contends (pp. 12-13) that the decision below conflicts with two other decisions of this Court, *Merchants National Bank* v. *Commissioner*, 320 U. S. 256 and *Henslee* v. *Union Planters Bank*, 335 U. S. 595. In both of these cases the trusts authorized invasion of principal for non-charitable purposes. In both cases the charitable deductions were properly disallowed because it was obviously impossible to measure the extent to which the corpus would be diverted to non-charitable purposes. They furnish no basis for overruling the findings of the Tax Court in the present case. This Court clearly indicated in its *Merchants National Bank* decision (at p. 261) that even in

such a case, if the extent of invasion were governed by readily ascertainable standards the deduction would have been allowed. In *Ithaca Trust Company* (*supra*), a power of invasion case, this Court allowed deduction of the charitable remainder, because the standard governing invasion was "fixed in fact and capable of being stated in definite terms of money" (p. 154).

Petitioner also cites (p. 12) various lower court decisions for the proposition that no deduction may be taken for conditional charitable remainders. We are in accord with all of these cases. In none of them could the charitable interest be valued on the date of the decedent's death. In *Knoernschild* v. *Commissioner*, 97 F. 2d 213 (C. A. 7th), the trust corpus was subject to an immeasurable invasion for non-charitable uses; this decision is in accord with *Merchants National Bank* discussed *supra*. In *Norris* v. *Commissioner*, 134 F. 2d 796 (C. A. 7th), deduction of an alleged charitable "bequest" was denied on the ground that it was precatory. In all the other cases, conditions attached to the charitable bequests rendered them incapable of valuation on the date of death. They involved the type of situation covered by Section 81.46 of Treasury Regulation 105 to which petitioner refers in his brief. Typical of these cases is *United States* v. *Fourth Nat. Bank in Wichita, Kan.*, 83 F. 2d 85 (C. A. 10th), certiorari denied, 299 U. S. 575, in which decedent gave $100,000 toward a church building fund "upon condition that the church should contribute an equal amount, with other stipulations" (p. 86). Naturally, the deduction was disallowed because on the date of decedent's death it was impossible to value the charitable bequest. Such a situation is entirely different from the case at bar and certainly is not inconsistent with the decision below. As the Tenth Circuit stated in *Fourth Nat. Bank in Wichita, Kan.* (at p. 90):

> "* * * if the value of that contingent interest can be ascertained by reasonable methods or by recognized data as of the date of the death of a testator, the amount for deduction should be so determined and the deduction allowed."

Contingent charitable remainders are deductible if they can be valued on the date of death. As stated in *Meierhof* v. *Higgins* (*supra*) (p. 1006):

> "The right to deduct the value in a case like the present depends not on whether it is contingent or vested, but on whether it has an ascertainable market value, and in view of the published Treasury practice in handling interests subject to identical uncertainties the taxpayers properly based the amount of their claimed deductions on actuarial computations."

None of the cases cited by the petitioner are inconsistent with the decision below. The unanimous *per curiam* opinion of Judges Learned Hand, Augustus N. Hand and Thomas W. Swan affirming the Tax Court is sound and accords with the decisions of this court and the various circuits.

CONCLUSION.

It is respectfully submitted that the Commissioner's petition for certiorari should be denied.

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